

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Kenneth NILSEN 056-50-3021-D3

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2514

Kenneth NILSEN

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.701, 5.607.

By an order dated 14 December 1988, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, revoked Appellant's Merchant Mariner's Document upon finding proved the charge of incompetence. The specification supporting the charge of incompetence alleged that Appellant, while serving under the authority of his above-captioned document aboard the USNS INVINCIBLE, did, while at sea on 5 August 1988, attempt to commit suicide by slashing his arms with a razor blade.

Hearings were held in absentia under the provisions of 46 C.F.R. 515.5(a) at Portsmouth, Virginia on 6 October 1988, and at Norfolk, Virginia on 7 November 1988, and 16 November 1988. The Investigating Officer introduced the testimony of four witnesses and seven exhibits into evidence. The Administrative Law Judge introduced ten exhibits into evidence, including two submitted by the Appellant by mail. The Administrative Law Judge issued an Order of Revocation on 25 November 1988, and a final Decision and Order on 14 December 1988. Subsequent to the Order of Revocation, on 28 November 1988, Appellant filed a pro se request for "retrial and appeal" with the Commandant, which was forwarded to the Administrative Law Judge. This submission is sufficiently detailed to be considered a concurrent Notice of Appeal and Brief. The Administrative Law Judge denied Appellant's request to reopen the hearing in an order dated 5 January 1989 and on the same day forwarded Appellant's notice of appeal of the Order of Revocation of 25 November 1988, to the Commandant. The record reflects no appeal of the denial of Appellant's petition to reopen the hearing by the Administrative Law Judge. Appellant has, however, met the requirements for filing an appeal of the Order of Revocation of 25 November 1988, established in 46 C.F.R. 5.703, and that appeal is now properly before the Commandant. In his appeal, Appellant stated that financial difficulty prevented his appearance at the hearings and that the Administrative Law Judge's order of revocation of his document was excessive.

FINDINGS OF FACT

During all relevant times, Appellant was the holder of Merchant Mariner's Document No. 056-50-3021-D3 which authorized him to serve as Able Bodied Seaman in the Deck Department.

On 4 and 5 August 1988, Appellant was serving aboard the USNS INVINCIBLE, in the capacity of an Able Bodied Seaman, under the authority of his aforementioned document. The USNS INVINCIBLE is a public vessel owned by the United States (Sealift Command) and operated by Sea Mobility, Inc.

On 4 August 1988, Appellant left his watch and deposited a note of resignation on the Master's desk. After speaking with Appellant, the Master felt the matter was resolved and that Appellant would continue his duties.

On 5 August 1988, while the vessel was at sea, Appellant left his duty station on the 0800-1200 watch without permission. A search of the ship discovered Appellant with a self-inflicted wound of his left

forearm, which was slashed by a razor blade. In his discussion with the Master, Mate, and Medical Department Representative on the USNS INVINCIBLE, Appellant stated that he could not endure a lengthy voyage or be away from shore for more than a couple of weeks, that he went "crazy" under such conditions, and that he had cut himself on a previous occasion in order to get home quickly. Due to his condition, Appellant had to be evacuated to another ship, the USNS PERSISTENT, in order to expedite his return to Norfolk, Virginia.

Appellant was served with the charges on 31 August 1988, by the Investigating Officer. On 27 September 1988, an order was made by the Administrative Law Judge transferring the location of the hearing from Norfolk to Portsmouth, Virginia because of facility unavailability. A copy of the order was delivered to the Appellant. On 29 September 1988, Appellant called the Administrative Law Judge's office to request a change of venue. The request was denied the same day and the Appellant was advised of the decision. Appellant again called the Administrative Law Judge's office on 5 October 1988, the day before the first hearing, and was told that the hearing would proceed as scheduled. Appellant did not appear at the first hearing nor was he represented by counsel. A plea of deny was entered on his behalf by the Administrative Law Judge. Despite being given notice of two more hearings, on 7 November and 16 November 1988, Appellant did not appear. [TR pp. 81-3, 91]. Appellant did, however, submit two letters of recommendation which were marked as Administrative Law Judge's Exhibits VII and VIII respectively.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant's bases of appeal are:

(1) The denial of Appellant's request for a change of venue and subsequent in absentia hearings denied Appellant due process by preventing his presentation of evidence.

(2) The Order rendered by the Administrative Law Judge was excessive.

OPINION

I

Appellant argues that it was error to deny his request for a change of venue and to conduct the hearings on 6 October 1988, on 7 November 1988, and 16 November 1988, in absentia, making said hearings "one-sided." I disagree.

Appellant's argument is without merit. When the Administrative Law Judge denied Appellant's request for a change of venue from Norfolk, Virginia to New York, New York on 29 September 1988, he properly considered that Appellant's only reason for the request was that Appellant lived in New York City. [TR p. 7]. Mere inconvenience to Appellant appears to be the only reason for the request. Inconvenience of a party is an insufficient ground for a change of venue. Appeal Decision 2237 (STRELIC). Appellant's unsubstantiated claim on appeal of a "financial crisis" is an insufficient basis upon which to reverse the Administrative Law Judge's determination of proper venue. The Administrative Law Judge did not abuse his discretion in denying Appellant's request for a change of venue.

On 27 September 1988, Appellant was formally informed of the time, place and nature of the suspension and revocation proceedings to be held on 6 October 1988. The Investigating Officer confirmed the time and place of the hearing in a telephone conversation with Appellant before the hearing. [TR pp. 6-7]. In addition, Appellant spoke with the Administrative Law Judge's office on two occasions. [TR p. 7]. Despite being given notice of two more hearings, on 7

November and 16 November 1988, Appellant did not appear. [TR pp. 81-3, 91].

Title 46 C.F.R. §5.515 states that:

(a) In any case in which the respondent, after being duly served with the original of the notice of the time and place of the hearing and charges and specifications, fails to appear at the time and place specified for the hearing, the hearing may be conducted "in absentia."

The Investigating Officer fully complied with the requirements of this regulation. It was Appellant's responsibility to appear at the hearing. Appeal Decision 2484 (VETTER). In the alternative, Appellant could have arranged for authorized representation at the hearing. Failing to do so, the decision of the Administrative Law Judge to proceed in absentia was not a denial of due process. Appeal Decision 2234 (REIMANN), Appeal Decision 2263 (HESTER).

Once the Administrative Law Judge determines that a respondent has notice of the time and place of the hearing, it is a proper exercise of authority to convene the hearing in absentia where he has failed to appear. Appeal Decision 2345 (CRAWFORD), Appeal Decision 2422 (GIBBONS). Here, the Administrative Law Judge made the proper inquiries and determination as required by 46 C.F.R. 5.515(b). [TR pp. 6-9]. By failing to appear at the proceedings, Appellant waived his right to present evidence in his defense. Appeal Decision 1957 (DIAZ), Appeal Decision 1963 (POTTS), Appeal Decision 2256 (MONTANEZ), Appeal Decision 2417 (YOUNG). Consequently, the hearings in absentia were proper, were in accordance with applicable regulations, and did not violate Appellant's due process rights.

II

Appellant contends that the Decision and Order rendered by the Administrative Law Judge was excessive. I disagree.

Three witnesses who testified at the hearing, the Master, a deckhand, and a Medical Department Representative were all on board the USNS INVINCIBLE on 5 August 1988. Two of the witnesses personally observed the Appellant state that he could not endure a lengthy voyage, that he went "crazy" under such conditions and that he had cut his wrists on another occasion in order to get home quickly. [TR pp. 32-3, 64]. All three witnesses testified from personal observation and direct knowledge of the incident.

It is the duty of the Administrative Law Judge to determine witness credibility and to weigh the evidence. Appeal Decision 2503 (MOULDS), Appeal Decision 2472 (GARDNER), Appeal Decision 2424 (CAVANAUGH), Appeal Decision 2423 (WESSELS), Appeal Decision 2404 (MCALLISTER). The testimony of the witnesses as reflected in the record is consistent, reliable, and sufficiently detailed for the Administrative Law Judge to have reasonably found the charge and specification proved. Absent evidence that the Administrative Law Judge's determinations were arbitrary or capricious, I will not disturb the decision. Appeal Decision 2484 (VETTER).

The Administrative Law Judge's order of revocation was not excessive. The Administrative Law Judge's order is within the guidance provided in the Table of Average Orders set forth in 46 C.F.R. §5.569. In fact, it has been previously held that a person who is suffering from a mental disability should not be permitted "to serve aboard any vessel . . . in a capacity in which he could cause serious harm to himself, to others, or to the vessel itself." Appeal Decision 2181 (BURKE), modified sub nom. Commandant v. Burke, NTSB No. EM-83 (1980). The entry of an appropriate order is peculiarly within the discretion of the Administrative Law Judge

absent special circumstances. Appeal Decision 2240 (PALMER), Appeal Decision 2313 (STAPLES), Appeal Decision 2344 (KOHAJDA), see also Appeal Decision 1585 (WALLIS). I do not find this case to be one of special circumstance and consequently will not disturb the Order of the Administrative Law Judge.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated 14 December 1988, at Norfolk, Virginia is AFFIRMED.

MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 12th day of October 1990.

NILSEN, K-#2514

3. HEARING PROCEDURE

3.57 In absentia proceedings

Proper where notice duly served

3.110 Venue

Inconvenience of party, insufficient grounds for change of

12. ADMINISTRATIVE LAW JUDGES

12.80 Modification of Order

Revocation is appropriate where suicide attempted in effort to get off ship

CITATIONS

Appeal Decisions cited: 2237 (STRELIC); 2484 (VETTER); 2234 (REIMANN); 2263 (HESTER); 2345 (CRAWFORD); 2422 (GIBBONS); 1957 (DIAZ); 1963 (POTTS); 2256 (MONTANEZ); 2417 (YOUNG); 2503 (MOULDS); 2472 (GARDNER); 2424 (CAVANAUGH); 2423 (WESSELS); 2404 (MCALLISTER); 2181 (BURKE); 2240 (PALMER); 2313 (STAPLES); 2344 (KOHAJDA); 1585 (WALLIS).

NTSB Cases Cited: Commandant v. Burke, NTSB Order EM-83 (1980).

Federal Cases Cited: None

Statutes & Regulations Cited: 46 USC +7702, 46 CFR +5.701; 46 CFR +5.607; 46 CFR +5.515(a); 46 CFR +5.703; 46 CFR +5.515(b);

46 CFR ÷5.569.

***** END OF DECISION NO. 2514 *****